

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4309 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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AHMEDABAD MUNICIPAL CORPORATION

Versus

AHMEDABAD MUNICIPAL NOKAR MANDAL

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Appearance:

MR DC RAVAL for Petitioner

MR MB GANDHI for Respondent No. 1

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CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 16/07/98

CAV JUDGEMENT

#. Rule. Mr.M.B.Gandhi, learned advocate for the respondent waives service of rule. The Ahmedabad Municipal Corporation has filed the present petitioner to challenge the award passed by Industrial Tribunal of Ahmedabad in reference No.705/89 on 10-4-1996.

#. Shri Ashok J. Vyas and four others who were working as despatchers, had raised industrial dispute

through their labour union i.e. Ahmedabad Municipal Nokar Mandal. It is the contention of the respondents despatchers that though they are appointed as despatchers, they are carrying out the work which is assigned to junior clerk thus as a matter of fact, they are working as junior clerk but they are not given the basic pay scale of junior clerk and on the principle of equal pay for equal work, they should be given the pay scale of junior clerk.

#. The present petitioner had resisted their claim by contending that the 5 respondents were originally working under the Nutrition Programme scheme. They were not initially directly recruited as the employees of the petitioner and when the said nutrition scheme had come to an end, there was likelihood of the respondents being thrown out of job therefore out of compassion and humanity, the Corporation decided to take up them in the services of Corporation. They were working as despatchers under the nutrition programme scheme and even after their absorption with the Corporation in the year 1972, they were absorbed as despatchers and continued to work as despatchers. For the purpose of recruitment of a person as junior clerk, the corporation has to issue public advertisement and call for the applications of the candidates and a selection process is held and the candidates are selected as junior clerks. The respondents have not gone through any such process and as they were taken on account of humanitarian approach and on compassion by creating separate cadre of despatcher, they cannot claim the status of junior clerks and they also cannot claim the pay scale of junior clerk. It was further contended by the petitioner that earlier a dispute was raised by these despatchers for getting the pay scale of junior clerk by claiming that they were carrying out the job of clerk. The said dispute was converted into Reference No.12/78 and was referred to the industrial tribunal of Gujarat. In the said reference which was decided on 10-11-1978,, the respondents despatchers were given the pay scale of Rs.230-350 and they were not given the pay scale of junior clerk of Rs.260-460. Therefore in the circumstances, in view of the earlier decision, their present claim stands barred by the principle of re judicata.

#. The respondents have produced certain certificates issued by the Assistant Assessor and collector of taxes and Divisional Superintendent of Vehicle Tax department to show that they were doing the work of junior clerks. The respondents had also contended that the Municipal Corporation was requested by

the superior officers under whom they were working to consider them for the post of junior clerk. As regards the said claim raised before the industrial tribunal, the present petitioner had submitted that as per the service condition of the junior clerk, the person seeking appointment as junior clerk has to go through process of selection, after the posts of junior clerk are advertised and the respondents had gone through the said selection process but they failed to get through selection process. Thus they were considered for the post of junior clerk on merits but they were not found suitable. Consequently there is no illegality in not appointing them as junior clerks.

#. The learned industrial court took into consideration the material produced before it to show that they were doing the work of junior clerk. He didn't take into consideration the earlier decision of his predecessor in reference No.12/78. He also didn't take proper cognizance of the fact that the respondent had gone through process of selection of junior clerk and they had failed in the said process. He merely took into consideration that they were doing the work which was being done by the junior clerks and therefore on the principle of equal pay for equal work, he held that the respondents were entitled to pay scale of junior clerk.

#. Being felt aggrieved by the said decision, the Corporation has come before this court by this Special Civil Application. Before proceeding with the submissions made before me, it is necessary to mention here that the former pay scale of junior clerk was of Rs.260-460 which is equal to the new pay scale of Rs.950 1500. Similarly, the pay scale of despatchers which was awarded to the respondents in Reference No.12/78 of Rs.230 350 is equated to Rs.950 - - 1400/- under the new pay scale. Thus, there is a difference of only Rs.100/at a fag-end of said pay scale.

#. There is no dispute of the fact that the present respondents were not initially selected and appointed as employees of the petitioner Ahmedabad Municipal Corporation. It is an admitted fact that they were originally the employees under the nutrition programme scheme. When the said nutrition programme scheme was abandoned some time in the year 1972 or thereabout, the petitioner Ahmedabad Municipal Corporation had agreed to absorb them in the municipal services. It is also an admitted fact that in the nutrition programme scheme (Poshanyukat Ahar Yojana), the respondents were working as despatcher and they were designated as despatchers.

When they were absorbed in the municipal service, they were designated as despatchers. There is no dispute of the fact that none of the respondents was ever taken on the role of the municipal corporation as junior clerk and each of them was taken on the role of municipal corporation as despatcher. There is no dispute of the fact that if the municipal corporation wants to appoint anybody as junior clerk then the Municipal Corporation will have to give a public advertisement calling for the applications for filling up the said posts of junior clerk and then the persons applied for the said posts have to go through the selection process and are ultimately selected on their successfully going through selection process as junior clerk. It is an admitted fact that the respondents have not gone through such selection process and they have not successfully come out of the selection process as junior clerk before their appointment in the municipal services. On the contrary it has come on the record that after they were taken as despatchers, they have gone through process for being selected as junior clerks and have failed. Now when it is an admitted fact that that they had gone through selection process of junior clerk, they have shown by their conduct that two posts, posts of junior clerk and post of despatcher are different posts. When two persons are holding two different posts, though their nature of work might be similar, or even equal they cannot claim parity of pay. When they are holding two different posts, each of them will be entitled to the pay and pay scale attached to the post which he is holding.

#. The judgment of the Industrial Court delivered in reference No.12/78 on 10th November, 1978 is produced on record at page 26. That was also produced before the learned industrial tribunal. The reference which was made in the Reference No.12 of 1978 runs as under :-

"The full time Despatchers of the Poshan Yukat Ahgar Yojna of Ahmedabad Municipal Corporation have to do the clerical job and hence they should be given the daily wages in the grade of junior clerk as per the award of Shri I.G.Thakore."

#. Shri I.G.Thakore had fixed the pay scale i.e. the grade of junior clerk at Rs.260 - 460/-. In the said award to which the present respondents were the parties, the claim of the respondents to get the pay scale of the junior clerk of Rs.260 - 460/- was turned down and taking into consideration that they were doing the clerical job, the industrial tribunal has passed final order in the said award as under :-

"It is hereby directed that the full time despatchers of the Poshan Yukta Ahar Yojanjan of Ahmedabad Municipal Corporation, which have also to do the clerical job, should be given their daily wages in the grade of Rs.230 - 350 retrospectively with effect from 1-1-1978.

..... "

##. Thus, in the said reference, the industrial court has already once held that the despatchers were not entitled to get pay scale of junior clerk, and taking into consideration that they were also doing the work of junior clerk, they were given specific scale of Rs.230 350. With due respect, for learned industrial tribunal it must be said here that he has not at all taken into consideration this earlier decision of his predecessor. It seems that he has not at all read the same. When there was earlier order on the issue in question by the competent authority merely because the same issue is again raised by the workman, he ought not to have considered and decided the same issue by holding that their claim is barred by general principle of constructive res judicata on account of the earlier decision in reference No.12/78 decided on 10-11-78.

##. Therefore the decision of the industrial tribunal is grossly erroneous and deserves to be interfered with by exercising the powers under Article 226 & 227. The learned industrial tribunal has not taken into consideration the earlier decision of his predecessor in Ref. No.12/78 and has also erred in not applying the principle of constructive res judicata. The industrial tribunal has committed further gross error by not taking into consideration that these respondents were holding a different post of despatcher and not of a junior clerk. He didn't take into consideration that for getting the post of junior clerk, the candidate has to go through process of selection and that the respondent had not gone through any such process of selection while getting the post of despatcher. Then the industrial court also didn't take into consideration when there are two distinct and different posts, though the nature of work in both the posts may be similar and even equal, the holders of two posts cannot claim the equality of pay scale. For example the junior clerks and senior clerks are doing the clerical job, but merely because they are doing the clerical job, they cannot claim that as their work is of the similar nature, they should be given equal pay.

##. In the case of State of U.P. and others V. Ministerial Karmachari Sangh, AIR 1998 S.C. -303, the Supreme Court has held that lower division and upper division in Secretariat cannot claim equal pay to that of the lower and upper division of Assistants in Directorate of Information when their mode of recruitment, qualification and promotion is different. In the instant case, I have already pointed out difference regarding the mode of recruitment, as far as despatchers are concerned there is no further promotional posts for them whereas the juniors clerks are entitled for further promotional posts as senior clerk, office superintendent and others. Therefore, in view of the above discussion, I hold that this is a fit case where the interference by this court by exercising powers under Article 226 & 227 of the Constitution of India is called for. The learned advocate for the respondent Mr. Gandhi submitted before me that as a matter of fact the Municipal Corporation will not financially suffer at present because the pay scale of the despatchers is Rs.950 - 1400 whereas the pay scale of junior clerks is Rs.950 1500/-. He further submitted that there is difference of Rs.100/- at the fag-end of the service. Therefore in the circumstances, this court should not interfere by exercising the discretionary powers under Article 226 & 227. I am unable to accept the said submission of him. In my humble opinion as a matter of fact the respondents ought not to have raised the dispute regarding the pay scale again when they already lost their claim in earlier proceeding of Reference No.12/78 and in order to honour the rule of law, it was necessary for them to abide by the earlier decision when they had not challenged said decision by preferring any writ or other proceeding. Similarly, they were absorbed in the municipal service on compassionate and humanitarian ground, without asking them to go through any selection process in the public service, they ought to have remained satisfied with whatever benefits they got and they cannot be allowed to raise the same and similar dispute again and again and then to get the fruits of wrongly raised dispute.

##. Therefore, the present petition will have to allowed and the award passed by industrial tribunal in Reference (IT) No.705/89 on 10th April,1996 is quashed and set aside but in the circumstances of the case, both the parties are to bear their respective cost.

(KPP)